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Nos. 80-2122 and 81-350

IN THE

Supreme Court of the United States

October Term, 1981

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner

v.

CITY OF CHEROKEE, ET AL.,
Respondents

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

CITY OF CHEROKEE, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by the petitioners are not supported by the decision below or by the record, for the court of appeals did permit the agency to "consider" all costs; properly set aside the agency's balancing of the public interest factors; and did not substitute the Administrative Law Judge's decision for the agency decision.

The questions presented, in the view of respondents, are:

1. Whether the court of appeals properly construed "avoidable costs" in light of the statutory term. 49 U.S.C. 10905(a)(1).
2. Whether the court of appeals properly overruled the I.C.C.'s sole reliance upon profitability of a line in balancing the benefits and burdens of continued rail service.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 641 F.2d 1220. (Pet. App. A, 1a-27a).[2] The decision of the Interstate Commerce Commission is reported at 363 I.C.C. 93 (Pet. App. E, 42a-51a). The decision of the Ad-

[1]The (non-federal) parties to the proceedings below are listed in the caption of the petition in No. 80-2122.

[2]Unless otherwise indicated, references to the opinions below are as paginated in No. 81-350, the petition of the Interstate Commerce Commission for a writ of certiorari.

ministrative Law Judge is unreported. (Pet. App. F, 52a-85a).

JURSIDICTION

The judgment of the court of appeals (Pet., 28a) was entered February 12, 1981. The railroad's petition for rehearing was denied March 17, 1981. (No. 80-2122, App. C). The I.C.C.'s petition for rehearing was denied April 9, 1981. (Pet., 29a). The petitions for a writ of certiorari were filed June 15, 1981 in No. 80-2122, and on August 24, 1981 in No. 81-350, both within the time as extended. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Former provisions of 49 U.S.C. 10903-5 (1976 Ed. Supp. III) are set forth in the petitions. (No., 80-2122, S1-S7; Pet., 86a-90a). Portions of certain I.C.C. regulations also are reproduced. (Pet., 92a-94a).

STATEMENT

This litigation arises from the application, filed in December, 1977, by Illinois Central Gulf Railroad Company (ICG) to abandon its 96-mile line between Cherokee, Iowa and Sioux Falls, South Dakota.[3] If successful, ICG would continue service on a 2-mile portion leading from Cherokee, by reclassifying the track from main to industrial, but ICG would physically abandon the remaining 94 miles. (Pet., 32a n.1, 52a-53a). The ICG application

[3]The line also traverses a short distance in Minnesota, serving two communities. (Pet., 67a).

was filed under former 49 U.S.C. 1a, the provisions of which were codified in 1978 to 49 U.S.C. 10903-5, as pertinent here.[4] However, Staggers Rail Act of 1980 subsequently was signed into law October 14, 1980. P.L. 96-448. The provisions of 49 U.S.C. 10903-5 were substantially amended by Staggers Rail Act of 1980, but not from a substantive standpoint.[5]

ICG's application was heard by Isabelle R. Cappello, Administrative Law Judge (ALJ). The ALJ denied the abandonment for a number of reasons. She found that after proper adjustments are made for labor costs, the revenues generated by the Sioux Falls District line have been sufficient to make a contribution to ICG, although with a low rate of return on investment. In balancing the benefit of the service to the public against the burden upon ICG, she came down on the side of the public and denied the abandonment, noting in particular that ICG made no commitment to use any fund freed up by abandonment for other rail activities.[6] (Pet., 80a-85a).

The wages which ICG had assigned to the line for enginemen and firemen, and for trainmen, were contested by M.S. Stuckey, General Chairman for the United Transportation Union, who appeared at the Cherokee, IA hearing. Mr. Stuckey testified that the railroad would con-

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[4]Congress reenacted the Interstate Commerce Act as Subtitle IV of Title 49, United States Code (P.L. 95-473, 92 Stat. 1337). The recodification did not make any substantive change. 92 Stat. 1455.

[5]P.L. 96-448, section 402. "No changes are made in the standards under which the I.C.C. decides whether or not to grant the abandonment of railroad lines". S. Rept. 96-470, 39 (1979); See also: S. Rept. 96-1430 (Conf. Report), 125 (1980).

[6]ICG is a wholly-owned subsidiary of IC Industries, which specializes in consumer products. (Pet., 53a-54a, 83a-84a).

tinue to pay the crew wages even if the line is abandoned. ICG did not offer any rebuttal to the labor witness, and the labor organization attached to its brief testimony by an ICG witness in another I.C.C. abandonment case that acknowledged that trainmen wages were non-avoidable owing to the same "tabulated local agreement". The ALJ found "ICG did not establish by reliable, probative, and substantial evidence that the wages of these employees would be saved."[7] (Pet., 60a-61a).

The "tabulated local rule" requires the railroad to assign two crews regularly to operate not less than 6 days per week between Cherokee and Sioux Falls and, if the line is not operated, to pay them the mileage of their assignment. (Pet., 60a).

The ALJ's decision was lengthy, and went into great detail concerning the economics of the train service and the needs of the involved shippers and communities. (Pet., 52a-85a).

On appeal, Division 1 of the I.C.C., composed of three commissioners, reversed the ALJ, and ruled that the "tabulated local rule" is a private labor-management agreement that is not within the purview of the I.C.C.'s expertise or responsibility. Division 1 referred to the I.C.C.'s abandonment regulations which recognize crew costs as "avoidable costs". (Pet., 45a-46a). In addition, Division 1 disagreed with the ALJ's finding that real estate taxes likewise were not avoidable, although this point had not been found controlling by the ALJ. (Pet., 46a); and also that the ALJ's traffic prospects were unduly optomistic. In light of these factors, Division 1 believed continued operation of the Sioux Falls District line will impose an undue

[7]The statute specifically places the burden of proof upon an applicant for abandonment. 49 U.S.C. 10904(b) (1976 Ed. Supp. III). (No. 80-2122, S-3).

economic burden upon ICG, which is not offset by the inconvenience and additional expense to shippers and adverse impact on rural and community development. (Pet., 47a).

The entire I.C.C. found the case involved matters of general transportation importance, and gave further consideration. It noted confusion and possible conflict between divisions and among ALJs., concerning "avoidable costs" and the burden of proof. (Pet., 31a). While affirming the decision of Division 1, the I.C.C. stated the crew wages must be considered avoidable upon abandonment for an even more fundamental reason. This reason was that to carry out the purpose of determining the effect on an abandonment upon the economic well-being of a railroad, (Pet., 33a):

> ". . . every ongoing out-of-pocket cost of a particular rail operation, that cannot be properly reallocated to any other revenue – producing operation, must be considered as part of the cost of the operation proposed for abandonment."

The I.C.C. then said "avoidable cost" is necessary because of joint costs – that is, costs which support two or more revenue-producing operations. Since the train crews only operate over the Cherokee-Sioux Falls line, their wages are not joint costs and cannot be reallocated to any traffic other than that transported over the line. Accordingly, the I.C.C. ruled that the crew wages are "avoidable" even though they would not be saved. However, if it turned out that ICG is required to continue paying these crews, then the wages would be treated as a *deferred* cost of the abandoned operation. The I.C.G. added that "no one contends that they will continue indefinitely to be paid for doing nothing." (Pet., 33a-35a).

Finally, the I.C.C. said that there is a close analogy between "this local labor agreement" and the labor protective conditions that the I.C.C. uniformly imposes in rail merger and abandonment cases, and that it would be improper to use the prospective imposition of labor protective provisions as an argument for ignoring present labor costs. (Pet., 35a-36a).

The I.C.C. concluded that the "tabulated local agreement" is "simply irrelevant". (Pet., 40a).

The court of appeals reversed the I.C.C., and remanded the cause for reconsideration. The two dispositive questions were whether the I.C.C. correctly included train and engine crew wages as "avoidable costs", and whether the I.C.C. properly balanced the interests of the carrier and the affected communities before authorizing abandonment.

The court observed that the collective bargaining representative testified without equivocation that the wages must be paid under existing agreement even if the trains are not operated, and the only indication to the contrary in this record is an unsworn and unsupported denial by the carrier's attorney. (Pet., 14a n. 7).

The court said that the I.C.C. tied "unavoidable" costs to "joint costs", and concluded that there were no joint costs in this case, all costs being avoidable upon abandonment. This was error, and the I.C.C. should have used the term "avoidable cost" as defined by Congress as a guide. 49 U.S.C. 10905(a)(1) (1976 Ed. Supp. III) – "all expenses that would be incurred by a rail carrier that would not be incurred if the railroad line over which the transportation was provided were abandoned . . . (Pet., 14a-16a).

On the second issue, the court said the I.C.C. in substance had ruled that abandonment is permissible if the

railroad could not operate the line as a profitable concern, and if it could earn greater profit by abandonment and sale. This was held eror, as the test for abandonment is not solely whether the carrier's investment can be more profitable but to work elsewhere, but involves a balancing of interests. (Pet., 16a-17a).

Judge Adams dissented. He faulted some of the language in the majority opinion which contained a typographical error. In response to the objectors' contention that the wages must be *solely* incurred for continued service to be "avoidable", he said the issue was whether the I.C.C.'s decision had a rational basis. He found the I.C.C.'s concept of a "deferred wage cost" not to be arbitrary, and neither a valid basis for denying abandonment nor a ground for defining an unprofitable operation as profitable. (Pet., 20a-23a). He equated the treatment of wage costs with real estate taxes, claiming the latter also avoidable within a reasonable time after abandonment. (Pet., 23a-24a). Finally, the dissent faulted the majority for passing upon an issue not briefed, i.e,, the balancing of the benefits and burdens of the abandonment. (Pet. 24a-26a).

ARGUMENT

This case rests largely on its own peculiar facts and creates no conflict among the circuits. Nor is there any legal issue of national importance. The "tabulated local rule" is unique to certain specified lines of the former Illinois Central Railroad Company, and has no counterpart on other railroads. National Railroad Adjustment Board-First Division, Award 17194 (Docket No. 27306) (October 26, 1955):

> "The Illinois Central is unique among railroads in its contract provisions for payment of the local

> freight rate. Instead of having, like other railroads, a rule that provides for payment of the local freight rate for performance of a specified amount of picking up, setting out, and station switching, the Illinois Central and its conductors and trainmen have a rule providing for application of the local freight rate to certain numbers of assigned crews on specified operating districts and, in addition, several supplementary local agreements calling for payment of the local freight rate to crews as specified therein. The effect of the Illinois Central contract provisions is that the local rate follows the assignment of crews to which it is negotiated rather than, as on other railroads, a certain type of work.

The "tabulated local rule" is not a labor protective condition instituted to ease transition to abandonment,[8] nor is it a "deferred" cost of abandonment. Rather, the rule is an integral part of working conditions on certain portions of the present ICG. To be sure, ICG periodically seeks changes in the rule, and has a notice pending under section 6 of the Railway Labor Act, presently in mediation.[9] But it is presumptious of the I.C.C., to assert "no one contends that they will continue indefinitely to paid for doing nothing". (Pet., 35as n.5; Pet., 5; Pet., 22a). For the structure of the Railway Labor Act is that the status quo shall

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[8]Employee protection for abandonments stems from Congressional legislation, as implemented by the I.C.C. See: *Oregon Short Line R. Co. Abandonment-Goshen,* 354 I.C.C. 76 (1977), 354 I.C.C. 584 (1978), 360 I.C.C. 91 (1979), 360 I.C.C. 666 (1980).

[9]Mediation Case No. A-10454.

be maintained unless altered according to its provisions[10] Cf. *Elgin, J. & E R. Co.* v. *Burley,* 325 U.S. 711, 722-28 (1945); *Trainmen* v. *Chicago, R. & I. R. Co.,* 353 U.S. 30 (1957).

The I.C.C.'s assertion that the avoidability or non-avoidability of labor costs presents an "important and recurring" question warranting review is without any foundation. There is absolutely no support for the I.C.C.'s view that "most" collective bargaining agreements "typically" contain provisions for "employee protection" like those in this case which may prevent a railroad from immediately eliminating all of these costs upon abandonment. (Pet., 8-9). The I.C.C. cites no examples, and there are none with perhaps the exception of enginemen (firemen) wages which the I.C.C. itself considers non-avoidable in many instances. *Baltimore and Ohio R. Co. Abandonment,* 354 I.C.C. 798, 853 (1978), remanded sub nom. *Illinois* v. *I.C.C.* (No. 78-1762), 7th Cir., 1/20/81).[11]

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[10]ICG's position before the I.C.C. was that the tabulated local rule would not apply where an "entire" district is to be abandoned, but here 2 miles would remain. (Pet. 32a n. 1). The court of appeals noted that ICG offered no testimony, only the view of its counsel. (Pet., 14a n. 7).

[11]For a general background to the enginemen/firemen situation, see: *Brotherhood of Railroad Trainmen* v. *Akron & B.R.R. Co.,* 385 F.2d 581 (D.C. Cir. 1967), cert. den. 390 U.S. 923; *Brotherhood of Loc. Fire. & Eng.* v. *Atchison, T. & S.F. Ry. Co.,* 442 F.2d 794 (D.C. Cir. 1971).

Moreover, amendments to the abandonment provisions resulting from Staggers Act of 1980 — now insure that there will be rapid and continual review of abandonment applications. The I.C.C. must make an initial determination within 165 days after an application is filed, which is comparable to the approximately 150 days for passenger train discontinuances. 49 U.S.C. 10904(c)(3); 49 U.S.C. 10908; P.L. 96-448, Section 402).

The I.C.C. during the 25-months period August 1, 1979 through August 31, 1981, has approved every abandonment application, and has reversed every ALJ that dared deny an application. This has embraced 330 cases involving 8,726 miles of line. This is a record of unblemished support for the railroad industry, and is inconsistent with prior practice, when abandonments on occasion were denied. Cherington, Charles, *The Regulation of Railroad Abandonments,* 100-101 (Harvard, 1948); Conant, Michael, *Railroad Mergers and Abandonments,* 114 (Univ. of Calif., 1964). An occasional court remand should come as no surprise in view of the I.C.C.'s current handling of abandonment matters.

1. *"Avoidable costs" and "Joint costs".* The court of appeals did not err in requiring the I.C.C. to employ "avoidable costs" as defined by the Congress, rather than to equate joint costs with non-avoidable costs[12] The

[12]I.C.C. and ICG both highlight the dissenting expression in its quibbling over typographical error by which the majority termed the agency had redefined "avoidable cost" as synonymous with "joint cost". (Pet., 8, 12-13, 20a; No. 80-2122, 11). The majority opinion correctly quoted the I.C.C.'s "joint cost" theory as unavoidable costs at four places in the text (Pet., 2a, 10a, 15a), but had two typographical errors elsewhere. (Pet. 10a, 15a).

I.C.C. until this abandonment proceeding had used the same statutory concept of "avoidable cost" for abandonments as for subsidy under 49 U.S.C. 10905, which was developed in rulemaking. *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 214, 218, 228 (1977). The costing standards for subsidy purposes and abandonment purposes should be the same. *Chicago & North Western Transp. Co.* v. *U.S.*, 582 F.2d 1043, 1060-61 (7th Cir. 1978), cert. den. 439 U.S. 1039. Moreover, in its abandonment regulations, the I.C.C. has indicated that when "actual costs are specified as the basis for assigning an expense, it shall mean that the only costs which can be assigned to the account are those costs which are incurred *solely* as a result of the continuation of rail freight service on the branch. (Pet., 91a-92a).[13]

The Seventh Circuit recently commented upon the I.C.C.'s decision in this case. Nos. 80-2096 & 80-2097, *International Minerals & Chemical Corp.* v. *I.C.C.*, The Seventh Circuit said that language in the I.C.C.'s opinion suggested that the only unavoidable costs were those which are joint; however, the Seventh Circuit panel noted that "while a true joint cost may almost always be unavoidable, not all unavoidable costs are joint ones." (Nos. 80-2096 and 80-2097, Slip op., pp. 6-8, 8/3/81).

Here, the I.C.C. departed from the statutory provision, and from its own regulations. It was error for the I.C.C. to equate an "unavoidable cost" with a "joint cost". A cost may be unavoidable, yet not be a joint cost.

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[13]The I.C.C.'s reproduction of its accounting regulations for engine crews-Salaries and wages, and Train crews-Salaries and wages, employs "Do" as the basis. (Pet., 91a-92a). The "Do" refers to "Actual" in an earlier column not reproduced 49 CFR 1121.42.

2. *Analogy with property taxes.* One of the features of the dissenting opinion is claimed analogy between property taxes and labor expenses. (Pet., 23a-24a) The court of appeals agreed with the I.C.C. that property taxes were shown avoidable. (Pet., 12a n.5). But real estate taxes were found avoidable because of a reasonable certainty they would be avoided following abandonment. (Pet., 37a). Certain labor costs, in this proceeding, cannot be found avoidable with such certainty, and would be contrary to existing labor agreements which can be changed only in the prescribed manner.

3. *ALJ versus I.C.C.* Another feature of the dissenting opinion was the claim that the court of appeals should not have altered its level of review because the I.C.C. differed from its ALJ, and that the ALJ's conclusion is to be accorded little deference except on matters of credibility. (Pet., 19a). In this Court, ICG bases virtually its entire petition for a writ of certiorari on the assertion the court of appeals substituted the ALJ's decision for that of the agency itself.[14] (No. 80-2122, ii).

But the fact that the court of appeals said that the ALJ was right and the I.C.C. was wrong, does not mean that the court of appeals substituted one discretionary decision for another. In the case of "avoidable cost", the issue is one of law and the definition of "avoidable cost"; in the case of the "balancing test", clearly the I.C.C. stated in substance costs were controlling, and I.C.C. did not weigh

[14]ICG also stated the court of appeals decision was contrary to two other decisions, one in the 8th Circuit and the other in the 7th Circuit, (No. 80-2122, 17-18). But there is no inconsistency. Here the court of appeals did not fail to "consider" labor costs; rather, the court of appeals did not view certain costs to be "avoidable" costs.

the benefits and burdens to *both* the carrier and the communities. (Pet., 17a).

The court of appeals referred to the ALJ's difference with the I.C.C. only to support a "searching inquiry" of the record, along with the I.C.C.'s admission that its approach to this area of the law is in a state of confusion. (Pet., 11a n. 4). The court below recognized that it could not affirm the ALJ's decision. (Pet., 17a). The court of appeals did not violate the rulings of *Universal Camera Corp.* v. *L.L.R.B.*, 340 U.S. 474 (1951) or *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). Indeed, this Court in *Universal Camera,* recognized a legislative purpose to enhance the status and function of the trial examiner, with the report to be given such probative force as it intrinsically commands, and that the examiners should have high standards of independence and competency. *Universal Camera,* 340 U.S. at 1493, 495.

4. *Balancing of benefits and burdens.* It was not error for the court of appeals to set aside the I.C.C.'s ultimate finding which asserted to balance the burdens/benefits. (Pet., 16a-17a). Such a remand on this issue would be required in any event owing to the "avoidable cost" ruling, for a new balance would need be struck.

The I.C.C. claims this is a "new issue" not raised in petitioners' brief below. (Pet., 15-16). The I.C.C. urges the Supreme Court's rule against reviewing issues not raised below be applied to courts of appeals reviewing agency decisions. (Pet., 16). There is no support for the I.C.C.'s position. First, the matter was raised at oral argument below. Second, the cases relied upon by the I.C.C. are situations of private litigation, rather than agency review proceedings.

The court of appeals properly reviewed the entire record to determine the proper legal standards. (Pet., 10a-11a). In judicial review of agency action, the petitioners only have standing as representatives of the public interest. There are many persons not represented directly in review of this 96-mile abandonment proceeding. The Court stated in *Scripps-Howard Radio* v. *Comm'n*, 316 U.S. 4, 14 (1942):

> "But these private litigants have standing only as representatives of the public interest."

Moreover, the I.C.C. erred in weighing only the burden of continued operation upon ICG against the burden of discontinuance to the public, along with the benefit to ICG of abandonment. (Pet., 47a., 41a). The benefit to the public of continued operation was not measured by the I.C.C. (Pet., 17a). The Court stated that *both* benefits and burdens must be balanced. *Colorado* v. *United States*, 271 U.S. 153, 168 (1926):

> "The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce."

In its petition to the Court, the I.C.C. admits it gives *primary* consideration to whether the line is profitable to the railroad. (Pet., 2). We do not read *Colorado* to tip the scales in such fashion.

The court of appeals did not err in remanding the cause for a proper balancing of the benefits and burdens to both the carrier and the communities upon either abandonment or forced continued operation of the line.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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